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No. 08-274

IN THE

Supreme Court of the United States

PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION, INC.,
Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

4. Whether the federal question raised in the Petition was presented to the Supreme Court of New Jersey.

5. Whether the Supreme Court of New Jersey correctly interpreted and applied the Instruction.

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THE PETITION SATISFIES RULE 14.1(g)(i); THE PBA RAISED THE FEDERAL QUESTION BELOW

Contrary to the Port Authority's assertion, the Supreme Court of New Jersey directly addressed the applicable law applied in reviewing Panel decisions: "The standard of review to be applied to decisions by the Panel has, to date, avoided judicial scrutiny in New Jersey." The New Jersey Court then held that the New Jersey Administrative Procedure Act applied. [Appendix A at 18a-20a]. The Supreme Court of New Jersey was incorrect. It should have

applied federal law in reviewing the Panel decision. As noted in the Petition, Petitioners argued before the New Jersey courts that New Jersey law was not the appropriate body of law to apply.

Contrary to the Port Authority's assertion that Petitioners failed to comply with Rule 14.1(g)(i), the Petition (at pages 6 through 13) summarized the briefs submitted by all parties to the Panel, to the Superior Court, to the Appellate Division, and to the Supreme Court. At each stage of the appellate review process, the PBA argued consistently that New Jersey law did not apply and that the New Jersey courts had to apply an amalgam of New York and New Jersey law. The Panel expressly argued that the divergence between New York and New Jersey law had required the Panel to take an independent approach. These citations satisfy Supreme Court Rule 14.1(g)(i).

It is true, as the Port Authority argues and as we conceded [Petition at 16, n. 24], that the PBA never labeled its arguments on applicable law as an argument to specifically apply federal law. But arguments about what law applies were repeatedly made, and the choices of law proposed by PBA and the Panel to the New Jersey courts are, in effect, the amalgam that would be federal law in this context. Both the PBA and the Panel consistently argued that the New Jersey courts could not apply New Jersey law without consideration of New York and federal law.

When the state court does not expressly address the federal question, the petitioner must demonstrate "that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" *Adams v. Robertson*, 520 U.S. 83,

87 (1997), quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981). In *New York v. Zimmerman*, 278 U.S. 63, 67 (1928), this Court recognized that federal issues could be raised in many ways:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this be done, the claim is to be regarded as having been adequately presented.

The PBA and Panel briefs were sufficient to alert the Supreme Court of New Jersey that the standard of review had, thus far, "avoided judicial scrutiny in New Jersey." The PBA and the Panel argued that federal law should have been applied. The PBA cannot be faulted for the New Jersey Supreme Court's failure to address the issue in its decision. But the PBA and the Panel presented the issue "with fair precision and in due time."

Unfortunately, the Supreme Court of New Jersey chose to apply a less deferential standard than the New York courts would apply and even a less deferential standard than the New Jersey Supreme Court applies to decisions of New Jersey administrative agencies.

APPLYING THE WRONG DEFERRAL STANDARD, THE NEW JERSEY SUPREME COURT MISAPPLIED THE INSTRUCTION

By rejecting the Panel's decision in this case, the Supreme Court of New Jersey cavalierly eviscerated the entire line of Panel decisions beginning with *The Lieutenant's Case*, 77 PAERP 6 (1978). As the Panel

stated, "Through case law over an extended period of time, the Panel has clearly enunciated the standards to be applied in determining whether a decision to transfer unit work is mandatorily negotiable and thus whether an unlawful transfer of unit work has occurred." [Appendix C at 89a]. Subcontracting bargaining unit work necessarily implicates "staffing" matters.

Relying solely upon the provision in the Instruction that "the mission and management authority of the [Port] Authority, including its organization, staffing, planning, operating and financial policies, shall not be subjects of negotiation with employee organizations" [Appendix A at 21a-22a], the Supreme Court of New Jersey ignored the fact that after the Panel adopted the *Fibreboard*-plus test in *The Lieutenant's Case*, the parties had vested the Panel with exclusive jurisdiction to resolve unit work disputes. [Appendix C at 88a-89a and n. 2]. Thus, the Panel was required to consider relevant portions of the collective bargaining agreement [Appendix C at 88a-89a]:

> 1. . . . during the term of the Agreement, there will be no further or additional transfer and/or reassignment of unit work currently and heretofore performed by unit employees without negotiation and all other work currently and heretofore performed by Police Officers shall be maintained. . . .
>
> 7. All existing Police Officer positions and/or assignments shall be maintained during the term of this memorandum of Agreement in accordance with the Police Position and/or Assignment List agreed upon between the parties so long as the work being performed continues to be

performed by or **on behalf of** the Port Authority. (Joint Exhibit 11, Article XXX). (emphasis added).

Despite citing these contractual provisions in its recitation of the facts [Appendix A at 7a], the Supreme Court of New Jersey then ignored them and their role in the Panel's analysis of the facts. Instead, in concluding that the Panel decision was not entitled to "any special deference," the Supreme Court of New Jersey explained that the Panel's interpretation of the lease between the Port Authority and JFKIAT "does not reside within the Panel's unique area of competence." [Appendix A at 22a]. Because the parties had expressly authorized the Panel to interpret the collective bargaining agreements' unit work provisions, the Panel's reliance on the contract provisions was entitled to deference.

Emphasizing that the Panel's *Fibreboard*-plus test was not consistent with its application to New Jersey state employees (which should have been irrelevant to the review of a Panel decision), the Supreme Court of New Jersey then purported to apply the test to the facts without either deferring to the Panel or explaining how the Panel's application of the test was arbitrary or capricious. [Appendix A at 24a-28a].

In sum, the Supreme Court of New Jersey simply substituted its interpretation for the Panel's, contrary to this Court's instruction that a reviewing court should uphold an agency's interpretation when it is "rational and consistent with the Act . . . even if we would have formulated a different rule had we sat on the Board." *Curtin-Matheson Scientific v. NLRB*, 494 U.S. 775, 787 (1990).

CONCLUSION

The petition for the writ of certiorari should be granted and the decision of the Supreme Court of New Jersey should be reversed.

Respectfully submitted,

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